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No. (1) 08-248

Supreme Court, U.S.
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In The

Supreme Court of the United States

TRUDY NOLLES, et al.,

Petitioners,

vs.

THE STATE COMMITTEE FOR THE REORGANIZATION OF SCHOOL DISTRICTS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

DONALD B. STENBERG (*Counsel of Record*)
ERICKSON | SEDERSTROM, P.C.
10330 Regency Parkway Drive, #100
Omaha, NE 68114-3761
(402) 390-7120
(402) 390-7137 Facsimile

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225 6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. When a state conducts an election in a manner that is fundamentally unfair, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, does a voter have standing to seek redress in federal court?

2. When a voter alleges that ~~state law~~ or the actions of state officials have prevented the voter from casting an effective ballot, has the voter alleged an injury which gives the voter standing to litigate the merits of the claim in federal court?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are:

The Petitioners, **TRUDY NOLLES, ANGIE PALMER, AND DAVID M. JEFFREY**, are registered voters in the State of Nebraska and were, until their school districts were dissolved, residents and property tax payers in Class I school districts in the State of Nebraska.

The Respondents are the **STATE COMMITTEE FOR THE REORGANIZATION OF SCHOOL DISTRICTS**, an entity created by state statute with the powers and duties prescribed by state statute and **KENDALL MOSELY, GILL KETTELHUT, TERESA HAWK, GERRY OSBORN AND TERRY LOSCHEN** who are the duly appointed and acting voting members of the State Committee for the Reorganization of School Districts and are sued in their official capacity.

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In the United States District Court for the District of Nebraska, *Nolles v. State Committee for the Reorganization of School Districts*, Case No. 8:06-CV-422 (November 20, 2006). Appendix A-28.

BASIS FOR SUPREME COURT JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its judgment on April 28, 2008. Appendix A-1. A Motion for Rehearing and Rehearing *En Banc* was timely filed. The Petition for Rehearing *En Banc* and Rehearing by the Panel was denied by the United States Court of Appeals for the Eighth Circuit in an Order dated June 11, 2008. Appendix A-52. This Petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a Writ of Certiorari a final judgment by a United States Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Constitution of the United States, Amendment Fourteen, § 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law . . . "

STATEMENT OF THE CASE

Statement of Facts

On June 3, 2005, the Nebraska legislature passed L.B. 126, a law directing the Respondent State Committee for the Reorganization of School Districts ("Committee") to dissolve over two hundred Class I school districts. Before the districts were dissolved, a Referendum Petition was circulated and on October 24, 2005, the Nebraska Secretary of State certified that the repeal of the law would be on the November 7, 2006 ballot. After the Secretary of State's certification, but prior to the November 2006 election, the Committee dissolved all of the Class I school districts. Petitioner's allege that this caused the referendum election to be fundamentally unfair because no matter how the majority of the people voted, the result would now be the same – all of the Class I school districts ceased to exist.

This action was filed in the United States District Court for the District of Nebraska on June 8,

2006, seven days prior to the effective date of the dissolution of the Class I school districts. The voters of Nebraska, at the November 2006 election, voted to repeal L.B. 126 by a vote of 56% to 44%. Despite that vote in favor of retaining Class I school districts, there are no Class I school districts in Nebraska today because of the Committee's action dissolving the Class I districts prior to the referendum election.

The remedy sought by the Petitioners, if they are successful on the merits, is a declaration that the dissolution of the Class I school districts prior to the election violated the Constitution of the United States, and, hence, was void *ab initio*. If the action of the Committee dissolving the Class I school districts was void *ab initio*, then all those districts continue to have legal existence, and the vote of the majority of Nebraskans to continue the existence of those districts will be carried into effect.

The Issue Presented by this Petition for Writ of Certiorari is Whether Petitioners Have Standing to Litigate Their Due Process Claim.

The Court of Appeals for the Eighth Circuit held that the Petitioner voters do not have standing to litigate the issue of whether the election was fundamentally unfair, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, because all voters were equally injured. The issue of standing was not raised by the Respondents or the District Court in its opinion. The

issue was raised by the Eighth Circuit panel at oral argument. The parties were subsequently directed to file supplemental briefs on the issue.

The U.S. District Court had jurisdiction pursuant to 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 1983. This is an action for declaratory judgment pursuant to 28 U.S.C. § 2201(a).

REASONS FOR THE ALLOWANCE OF THE WRIT

The Writ of Certiorari should be granted pursuant to Rule 10(a) and 10(c) of the Rules of the Supreme Court of the United States because the Eighth Circuit Court of Appeals has entered a decision in conflict with the decisions of three other United States Courts of Appeals on the same important matter, and because the Eighth Circuit Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The Eighth Circuit Court of Appeals Entered a Decision in Conflict with the Decisions of Three Other United States Courts of Appeals on the Same Important Matter.

The Eighth Circuit Court of Appeals held as follows:

> . . . [T]he Plaintiffs fail to allege a specific individualized injury necessary to establish standing in federal court resulting from the

> allegedly unfair election, that is, an injury not shared by all of the voters who voted as they did in the referendum election. 524 F.3d at 900.

Three federal circuit courts have allowed plaintiffs to proceed on their substantive due process claims of fundamental unfairness in election cases when all voters were equally injured. Only the Eighth Circuit Court of Appeals has held that no voter has standing when all voters are equally injured.

The following circuit courts have allowed plaintiffs to proceed under these circumstances.

The Fifth Circuit in *Duncan v. Poythress*, 657 F.2d 691, 693, 703-704 (5th Cir. 1981), *cert. granted*, *Poythress v. Duncan*, 455 U.S. 937, 102 S.Ct. 1426, 71 L.Ed.2d 647 (1982), *cert. dismissed as improvidently granted*, *Poythress v. Duncan*, 459 U.S. 1012, 103 S.Ct. 368, 74 L.Ed.2d 504 (1982), allowed "several registered voters" to litigate their substantive due process claim of "fundamental unfairness" where the "entire state electorate [had] been deprived of the right to participate in an election." The plaintiff voters were not required to show that they were injured more or differently than other voters. On the merits, the *Duncan* Court held that "the due process clause of the fourteenth amendment prohibits action by state officials which seriously undermines the fundamental fairness of the electoral process." 657 F.2d at 700.

The Seventh Circuit, in *Smith v. Cherry*, 489 F.2d 1098, 1102 (7th Cir. 1973), *cert. denied*, *Cherry v. Smith*, 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214

(1974), allowed a voter to proceed on his claim that, "all voters . . . were denied the right to vote because the Democratic candidate was not actually chosen in the primary but was instead chosen by the conspiring Committeemen." No violation of state law was found. The voter was not required to show that he was injured more or differently than other voters. On the merits, the *Smith* Court held:

> This deception on the face of the ballot clearly debased the rights of all voters in the election. Such an abridgement of the right to vote is impermissible and evinces the sufficiency of this complaint. 489 F.2d at 1102.

The First Circuit, in *Bonas v. Town of North Springfield*, 265 F.3d 69 (1st Cir. 2001), allowed four registered voters to proceed on their substantive due process claim that the defendants were denying the voters the right to a fundamentally fair election by not holding an election as required by the town charter. The four registered voters were not required to allege or prove that they were injured more or in any different way than all other voters. On the merits, the *Bonas* Court stated:

> Along with the *Duncan* Court, we "can imagine no claim more deserving of constitutional protection than the allegation that . . . officials have purposely abrogated the right to vote." 265 F.3d at 75.

Whether an individual voter has standing to challenge an election process that is alleged to be fundamentally unfair to all voters is a question of

great importance the answer to which should be uniform throughout the United States. Therefore, the Petition should be granted.

The United States Court of Appeals for the Eighth Circuit has Decided an Important Federal Question in a Way that Conflicts with Relevant Decisions of This Court.

The Eighth Circuit Court of Appeals stated as follows:

> The Plaintiffs in this case are attempting to bring a generalized grievance shared in common by all of the voters in Nebraska who voted to repeal L.B. 126. Because they have not asserted a personalized injury, they lack standing to assert a violation of substantive due process under the Fourteenth Amendment. 524 F.3d at 900.

The Eighth Circuit's holding that the Petitioner voters do not have standing is contrary to several decisions of the United States Supreme Court which have said that voters have standing to challenge alleged denial, impairment or ineffectiveness of their vote caused by state law or the action of state officials.

The definitive case establishing standing in voting rights cases is *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). In *Baker*, this Court specifically held that plaintiffs alleging impairment of their votes have standing. The Court stated as follows:

> It would not be necessary to decide whether appellants' allegations of impairment of their

> votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting a plain, direct and adequate *interest in maintaining the effectiveness of their votes*. 369 U.S. at 208. (Emphasis added.)

Here, the Petitioner voters are alleging that state law and the actions of state officials have rendered their votes ineffective. They are asserting a direct interest in maintaining the effectiveness of their votes. Under *Baker v. Carr*, *supra*, this gives them standing whether or not they will prevail on the merits of their claim that the referendum election was fundamentally unfair. If, as Petitioners allege, the referendum election was fundamentally unfair, then clearly the Petitioner voters here are among those who sustained the injury.

In *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), this Court held that all state legislative bodies must be apportioned on the basis of population. The Court clearly explained that the right to vote is an individual right that will be protected by the federal courts, not merely an undifferentiated, generalized grievance about the conduct of government. This Court stated as follows:

> A predominate consideration . . . is that *the rights allegedly impaired are individual and personal in nature*. As stated by the Court in

> *United States v. Bathgate*, 246 U.S. 220, 277, 38 S.Ct. 269, 271, 62 L.Ed. 676, *the right to vote is personal* . . . Undoubtedly the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. 377 U.S. at 561-562. (Emphasis added.)

The Court also stated:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. 377 U.S. at 554.

In reaching its decision, the Eighth Circuit seriously misapplied *Lance v. Coffman*, ___ U.S. ___, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007). In *Lance*, Colorado voters alleged that Art. I, § 4, cl.1 [the Elections Clause of the U.S. Constitution], which provides that state legislatures will determine the manner of holding elections, was violated because the Colorado Supreme Court redrew Congressional district boundaries instead of the Legislature.

Lance was not a due process voting rights case. The Court held as follows concerning standing:

> The only injury plaintiffs allege is that the law – specifically the Elections Clause – has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. *It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing.* See, *e.g.*, *Baker v. Carr*, 369 U.S. 186, 207-208 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). 127 S.Ct. at 1198. (Emphasis added.)

In other words, plaintiffs have standing in voting rights cases when they allege that their right to vote is denied, diluted or made ineffective. This is because the right to vote is a personal *right*, not an undifferentiated, generalized *grievance*. Despite this clear instruction from this Court, the Panel here held that the Petitioners' personal voting rights claim was an undifferentiated, general grievance about the conduct of government.

Additional Reasons for Granting The Petition

As discussed above, the Eighth Circuit decision that Petitioners do not have standing conflicts with the authoritative decisions of three other United States Courts of Appeals and with several decisions of the United States Supreme Court. In addition, this case involves the constitutionally protected right to cast an effective vote.

The merits of this case go to the integrity of the democratic process. Hundreds of volunteers worked

for thousands of hours to gain over 87,000 valid signatures to place this issue on the ballot to preserve Class I schools. 290,136 Nebraskans (56% of those voting) voted to repeal L.B. 126 so that Class I schools could continue to exist in Nebraska, but their votes made no difference. They were as effectively disenfranchised as if they had not been permitted to vote at all. The Petitioners have come to federal court to argue that this was a fundamentally unfair election. Contrary to all precedent, they are told by the Eighth Circuit, *sua sponte*, that since all 290,136 Nebraskans who voted to retain Class I school districts were equally injured (i.e., their votes were all equally ineffective), none of them have standing in federal court to protect their right to cast an effective vote.

CONCLUSION

Because the decision of the United States Court of Appeals for the Eighth Circuit is in conflict with the decision of three other United States courts of appeals, conflicts with several relevant decisions of this Court, and involves the integrity of the election process, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DONALD B. STENBERG
(Counsel of Record)
Attorney for the Petitioners

524 F.3d 892

United States Court of Appeals, Eighth Circuit.

Trudy NOLLES; Angie Palmer; David M. Jeffrey, Appellants,

v.

The STATE COMMITTEE FOR the REORGANIZATION OF SCHOOL DISTRICTS; Kendall Moseley; Gil Kettelhut; Teresa Hawk; Gerry Osborn; Terry Loshen, Appellees.

No. 06-4093.

Submitted: May 17, 2007.
Filed: April 28, 2008.

Donald B. Stenberg, argued, Erickson & Sederstrom, Omaha, NE, for appellant.

Dale A. Comer, A.A.G., argued, Lincoln, NE (Charles E. Lowe, A.A.G., Lynn A. Melson, A.A.G., on the brief), for appellee.

Before MURPHY, HANSEN, and COLLOTON, Circuit Judges.

HANSEN, Circuit Judge.

Trudy Nolles, Angie Palmer, and David M. Jeffrey (collectively "Plaintiffs") are registered voters in Nebraska who brought this 42 U.S.C. § 1983 action challenging the State Committee for the Reorganization of School Districts' (hereinafter "State Committee") implementation of Legislative Bill 126 (LB 126), which implementation occurred prior to the November 2006 referendum vote which ultimately repealed LB 126. The Plaintiffs claim that the State Committee's

actions violated the Plaintiffs' rights to substantive and procedural due process and their right to vote as protected by the United States Constitution. We dismiss both of the due process claims for lack of standing, and we affirm the district court's[1] judgment dismissing the right to vote claim.

I.

In 2005, the Nebraska legislature, overriding the Governor's prior veto, passed LB 126, which, *inter alia*, mandated the dissolution of all Class I school districts and required the Class I school districts to be merged into larger school districts that served students through the twelfth grade. Class I school districts provided education for students only from kindergarten through the eighth grade. LB 126 required the State Committee to issue orders by December 1, 2005, directing how each Class I school district would be merged. The orders merging the school districts were required by LB 126 to take effect on June 15, 2006, following the end of the 2005-2006 school year.

Nebraska citizens commenced a referendum effort, *see* Neb. Const. art. III, §§ 1, 3, & 4, and obtained enough signatures to put the repeal of LB 126 on the ballot at the next general election, which was to be held on November 7, 2006. The referendum

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[1] The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska.

effort did not, however, garner enough signatures to suspend the operation of LB 126 pending the result of the election, as required under Nebraska Constitution Article III, Section 3 (requiring the signature of 10% of registered voters to suspend the operation of the challenged law). Three residents and taxpayers in Class I school districts, along with several school districts, filed suit in Nebraska state court (referred to as the "*Pony Lake* litigation") seeking an injunction to prevent the State Committee from complying with LB 126 and entering consolidation orders before the November 2006 election. The state district court granted a permanent injunction, finding that the effective dates of the consolidation orders impermissibly burdened the people's right of referendum.

The State Committee appealed the injunction to the Supreme Court of Nebraska. Under Nebraska law, the appeal stayed the district court's injunction, *see* Neb.Rev.Stat. § 25-21,213 (1995), and the Supreme Court declined to issue its own temporary restraining order. On December 1, 2005, no longer under any injunction, the State Committee issued its orders of merger as required by LB 126, although the orders were not to take effect until June 15, 2006. The state court appellees then cross-appealed, claiming that LB 126's effective dates denied them the right to vote and the right to freedom of speech protected by the United States Constitution. The Supreme Court of Nebraska reversed the district court on March 3. 2006, concluding that the trial court had misapplied Nebraska's constitutional provisions

regarding referendums and holding that Article III, Section 3 of the Nebraska Constitution clearly provided that where the referendum petition failed to garner sufficient signatures, the legislation facing the ballot was not to be suspended pending the vote. *See Pony Lake Sch. Dist. 30 v. State Comm. for the Reorg. of Sch. Dists.*, 271 Neb. 173, 710 N.W.2d 609, 621-22 (Neb.), *cert. denied*, 547 U.S. 1130, 126 S.Ct. 2058, 164 L.Ed.2d 784 (2006). The state Supreme Court also addressed the federal voting right and free speech right issues raised by the cross-appeal to determine if the trial court could be affirmed on either alternative basis but determined that it could not. It determined that the right to vote protected by the federal Constitution applied to the right to participate in a representative government and had no impact on the direct democracy referendum process. *Id.* at 623-24. It further found no free speech violation because the referendum process did not restrict the state appellees' ability to communicate with voters about their attempt to repeal LB 126. *Id.* at 624-25.

After the Supreme Court of the United States denied the *Pony Lake* plaintiffs' petition for certiorari on May 15, 2006, the current Plaintiffs, none of whom were parties to the state court litigation, brought a declaratory judgment action in federal district court on June 8, 2006, claiming that LB 126 violated the federal Constitution's protection of the rights to vote and to freedom of speech, and the Fourteenth Amendment's protection of the rights to substantive due process and procedural due process. They sought

a declaration that the State Committee's actions were unconstitutional and therefore null and void. In the meantime, the school districts were merged pursuant to LB 126 effective June 15, 2006. The federal district court stayed its ruling on the § 1983 claims to see if the voters would retain LB 126, thus mooting the claims. The referendum appeared on the ballot at the November 7, 2006, general election, and the voters of Nebraska voted to repeal LB 126. Nothing about the repeal affected the prior actions of the State Committee or otherwise authorized the re-establishment of the dissolved school districts.

The district court subsequently dismissed the federal case, finding all of the claims to be barred by res judicata based on the *Pony Lake* litigation. The district court also determined that the right to vote and the right to freedom of speech claims were mooted because the Plaintiffs did in fact vote on the referendum and that the due process claims lacked merit. The Plaintiffs appeal.[2]

II.

A. Due Process

Even though not raised by the parties or addressed by the district court, we "are under an independent obligation to examine [our] own jurisdiction,

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[2] The Plaintiffs do not address the freedom of speech claim on appeal, and neither do we.

and standing is perhaps the most important of the jurisdictional doctrines." *United States v. Hays,* 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) (internal marks omitted). Federal courts are courts of limited jurisdiction, cabined by the authority granted to them by Article III of the United States Constitution. Article III limits federal courts' jurisdiction to the deciding of "Cases" and "Controversies." U.S. Const. art III, § 2; *see also Hein v. Freedom from Religion Found., Inc.,* ___ U.S. ___, 127 S.Ct. 2553, 2562, 168 L.Ed.2d 424 (2007) ("'"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."'") (quoting *Raines v. Byrd,* 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (in turn quoting *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 37, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976))). "'One of the controlling elements in the definition of a case or controversy under Article III' is standing." *Hein,* 127 S.Ct. at 2562 (quoting *ASARCO Inc. v. Kadish,* 490 U.S. 605, 613, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) (Kennedy, J., concurring)). At a "'constitutional minimum,'" standing requires three elements: (1) injury in fact, (2) causation, and (3) redressability. *Hays,* 515 U.S. at 742-43, 115 S.Ct. 2431 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Injury in fact requires the party bringing suit to have "a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent,

not conjectural or hypothetical." *Id.* at 743, 115 S.Ct. 2431 (internal marks omitted).

1. Substantive Due Process

The Plaintiffs claim that the implementation of LB 126 prior to the referendum vote, as required by Article III, Section 3 of the Nebraska Constitution, rendered their vote in the referendum election ineffective, resulting in a fundamentally unfair election process in violation of their right to substantive due process. The contested standing issue with respect to the substantive due process claim is whether the Plaintiffs can establish an injury in fact. "A federal court cannot pronounce any statute, either of a State or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (internal marks omitted); *see also id.* at 206, 82 S.Ct. 691 (holding that only those "voters who allege facts showing disadvantage to themselves as individuals have standing to sue"). Federal courts lack the authority to review legislative acts merely because they are allegedly unconstitutional. Rather, the courts are limited to considering the constitutionality of a legislative act only when it is said to result in or threaten a direct injury to the party challenging the act. *See Massachusetts v. Mellon,* 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) (dismissing for lack of standing a claim that the Maternity Act was unconstitutional in a case

brought based on taxpayer standing). "[W]here large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." *Fed. Election Comm'n v. Akins,* 524 U.S. 11, 23, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998).

"Election law, as it pertains to state and local elections, is for the most part a preserve that lies within the exclusive competence of the state courts." *Bonas v. Town of N. Smithfield,* 265 F.3d 69, 74 (1st Cir.2001). A canvass of substantive due process cases related to voting rights reveals that voters can challenge a state election procedure in federal court only in limited circumstances, such as when the complained of conduct discriminates against a discrete group of voters, *see, e.g., Hays,* 515 U.S. at 744-45, 115 S.Ct. 2431 (plaintiffs residing in racially gerrymandered districts could challenge redistricting as racially discriminatory); *Griffin v. Burns,* 570 F.2d 1065, 1074 (1st Cir.1978) (absentee voters whose votes were not counted could challenge decision, made after election, not to count absentee votes), when election officials refuse to hold an election though required by state law, resulting in a complete disenfranchisement, *see Duncan v. Poythress,* 657 F.2d 691, 693 (5th Cir.1981) (holding "that the due process clause of the fourteenth amendment . . . protects against the disenfranchisement of a state electorate in violation of state election law" where state officials refused to hold an election for a vacant Supreme Court justice seat as required by state law)

(subsequent history omitted); *Bonas,* 265 F.3d at 74-75 (holding that town officials violated voters' due process rights by refusing to hold a local election as mandated by state and local rules), or when the willful and illegal conduct of election officials results in fraudulently obtained or fundamentally unfair voting results, *see United States v. Saylor,* 322 U.S. 385, 388-89, 64 S.Ct. 1101, 88 L.Ed. 1341 (1944) (fraudulent ballot stuffing); *Briscoe v. Kusper,* 435 F.2d 1046, 1055 (7th Cir.1970) (holding that city board of election commissioners violated voters' rights to substantive due process by changing voting rules without informing voters of new requirements for voting and then refusing to count their votes).

The Supreme Court has "'consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.'" *Lance v. Coffman,* ___ U.S. ___, 127 S.Ct. 1194, 1196, 167 L.Ed.2d 29 (2007) (quoting *Lujan,* 504 U.S. at 573-74, 112 S.Ct. 2130). In *Lance,* four Colorado voters brought a claim in federal court, alleging that a provision of the Colorado Constitution permitting congressional redistricting only once per census violated their Elections Clause right to have their elected representatives set their congressional

district boundaries.[3] *See id.* The Supreme Court held that the voters lacked standing to challenge application of the Colorado Constitution because their only injury, "that the law – specifically the Elections Clause – ha[d] not been followed," alleged only a generalized grievance. *Id.* at 1198. The Court found the voters' claim to be "quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where [it had] found standing." *Id.* (distinguishing *Baker,* 369 U.S. at 207-08, 82 S.Ct. 691, where the Court held that voters in specific counties had standing to challenge as a substantive due process violation a state apportionment statute that apportioned state representatives among counties in a racially discriminatory manner); *see also Hays,* 515 U.S. at 744-45, 115 S.Ct. 2431 (holding that while a plaintiff residing in a racially gerrymandered district had

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[3] The facts of *Lance* are somewhat analogous to the facts here. In *Lance,* a state court redrew congressional district boundaries when the Colorado legislature was unable to agree on how to set the boundaries to accommodate an additional member of the federal House of Representatives following the 2000 census. The Colorado legislature finally reached agreement and subsequently redrew the district boundaries in 2003. The Colorado Attorney General challenged the subsequent redistricting as a violation of Article V, Section 44 of the Colorado Constitution, which limited redistricting to once per census. *See Lance,* 127 S.Ct. at 1196. Following extensive adjudication in state court, in which the Colorado Supreme Court ultimately struck down the 2003 legislatively-drawn redistricting plan as a violation of Section 44, the voter-plaintiffs moved to federal court, challenging the application of the state constitution as violating their rights under the federal constitution.

standing to challenge the redistricting, a plaintiff not residing in such a district lacked standing to challenge the redistricting).

The Eleventh Circuit recently recognized that *Lance* abrogated its prior precedent and held that voters in a county lacked independent standing to challenge a consent decree that increased the number of county commissioners, required a cumulative voting system, and instituted a system whereby the rotating Commission chairmanship would periodically be offered to an African-American. *See Dillard v. Chilton County Comm'n,* 495 F.3d 1324 (11th Cir.2007). Under its prior precedent, the Eleventh Circuit had found standing where voters were subject to a newly imposed election scheme ordered by the consent decree. *Id.* at 1331 (discussing *Dillard v. Baldwin County Comm'rs (Baldwin III),* 225 F.3d 1271, 1277 (11th Cir.2000)). The court determined that *Lance* changed its analysis, noting that *Lance* differentiated between plaintiffs "who alleged concrete and personalized injuries in the form of denials of equal treatment or of vote dilution, and plaintiffs like those in the instant case, . . . who merely seek to protect an asserted interest in being free of an allegedly illegal electoral system." *Dillard,* 495 F.3d at 1333.

The Plaintiffs in this case are attempting to bring a generalized grievance shared in common by all the voters in Nebraska who voted to repeal LB 126. Because they have not asserted a personalized injury, they lack standing to assert a violation of substantive

due process under the Fourteenth Amendment. The Plaintiffs couch their claim as one against the actions of the State Committee in voting to dissolve the Class I school districts prior to the referendum election. We respectfully reject this characterization. First, the State Committee did not act of its own accord, exercise its own independent judgment or discretion, or "vote" in any sense of the term, but instead acted pursuant to the mandatory requirements of the Nebraska constitution and the lawful directions of the then duly-enacted LB 126, which ordered the State Committee to dissolve the school districts on or before December 1, 2005, with an effective date of June 15, 2006. (*See* Appellants' App. at 46, LB 126 § 2(1) ("[O]n or before December 1, 2005, the State Committee . . . shall enter an order dissolving any Class I school district that does not comply with the requirements of subsection (4) of section 1 of this act. . . .) (emphasis added);" *id.*, LB 126 § 2(4) ("The effective date . . . shall be . . . June 15, 2006, for all other purposes [besides establishing residency].").) The State Committee members did not "vote" to dissolve the school districts, but merely acted to carry out their obligatory duties as mandated by the duly enacted and then binding and effective legislation.

Second, the claim that the application of Article III, Section 3 of the Nebraska Constitution (which prevented the delaying of the implementation of LB 126 until after the referendum election) resulted in a fundamentally unfair election does not allege a personalized injury. The Plaintiffs do not allege that

they were treated differently than other voters or that their votes were diluted as compared to other voters, that election officials refused to count their votes or failed to follow state election procedures, or even that the State Committee violated state law in dissolving the school districts (the Plaintiffs' complaint is the opposite – that the State Committee followed state law to the Plaintiffs' detriment). Nebraska voters successfully repealed LB 126 through the referendum voting process. As in *Lance,* they challenge only the application of the Nebraska Constitution to the state-created referendum process. This is a generalized grievance better left to the state political and legislative process. In short, the Plaintiffs fail to allege a specific individualized injury necessary to establish standing in federal court resulting from the allegedly unfair election, that is, an injury not shared by all the voters who voted as they did in the referendum election. (*See* Appellants' Suppl. Br. at. 5, arguing that there had been an injury to the right of every voter to a fundamentally fair election). Because the Plaintiffs lack federal Article III standing, their substantive due process claim must be and is dismissed for lack of federal jurisdiction.

2. Procedural Due Process

The Plaintiffs, all property taxpayers, also brought a procedural due process claim, alleging that the consolidation of the Class I school districts would increase property taxes for some properties located in

a former Class I district, and that they were entitled to a hearing before their property taxes could be raised. None of the Plaintiffs alleged, however, that their own property taxes were in fact (or would be) increased, only that some property taxes within the state would be raised, some would be lowered, and some would remain unchanged. Indeed, "[a]t the time this suit was filed the tax rates for the newly reorganized districts had not yet been set." (Appellants' Suppl. Br. at 9.) The amended complaint filed in the district court did not mention an increase in property taxes at all, but asserted only that the State Committee's actions of dissolving school districts and changing school district boundaries were quasi-judicial actions requiring a hearing. (Appellants' App. at 154, 156.)

The Plaintiffs failed to allege a particularized injury and thus lack standing to bring this procedural due process claim. *See Raines,* 521 U.S. at 818-19, 117 S.Ct. 2312 ("[A] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct."(internal marks omitted)). Article III's case and controversy prerequisite "requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (quoting *Gladstone Realtors v. Vill. of Bellwood,* 441 U.S. 91, 99, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)). *See also Lujan,* 504

U.S. at 560 n. 1, 112 S.Ct. 2130 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individualized way."). The Plaintiffs' claimed injury of the potential for increased property taxes without a hearing was conjectural, not concrete and actual or imminent at the time they filed their complaint, as is required to establish the standing necessary to challenge the state action. *See Lujan,* 504 U.S. at 560, 112 S.Ct. 2130; *see also id.* at 571 n. 4, 112 S.Ct. 2130 (plurality opinion) (Standing is "assessed under the facts existing when the complaint is filed."). The procedural due process claim is dismissed for lack of jurisdiction.

B. Right to Vote

The Plaintiffs claim that the State Committee violated their fundamental right to vote in the referendum election by implementing LB 126 before the general election, thus nullifying their subsequent sufficient vote to repeal LB 126. The district court dismissed the right to vote claim based on res judicata, or claim preclusion, applying the equitable doctrine of virtual representation and concluding that the Nebraska Supreme Court conclusively decided this issue in the *Pony Lake* litigation. The application of res judicata is a legal conclusion that we review *de novo. See St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp.*, 457 F.3d 766, 770 (8th Cir.2006). "The res judicata effect of the first forum's judgment is governed by [the] first forum's law," *id.* (internal marks omitted), or Nebraska law in

this case. Additionally, we review *de novo* the district court's interpretation and application of state law. *See Salve Regina Coll. v. Russell,* 499 U.S. 225, 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991).

Under Nebraska law,

> [t]he doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.

Ichtertz v. Orthopaedic Specialists of Neb., P.C., 273 Neb. 466, 730 N.W.2d 798, 804 (Neb.2007). The Supreme Court of Nebraska addressed and rejected the *Pony Lake* plaintiffs' constitutional claims, including the same right-to-vote claim brought by the Plaintiffs here. Thus, if applicable, res judicata prevents these Plaintiffs from relitigating the same claim in a second forum. The first three elements are not in dispute. The judgment in the *Pony Lake* litigation was issued by a court of competent jurisdiction; that judgment is final; and the judgment determined the merits of the *Pony Lake* plaintiffs' right-to-vote claim under the United States Constitution. Thus, the only contested issue is whether the Plaintiffs in the present case are in privity with the *Pony Lake* plaintiffs.

"State courts are generally free to develop their own rules for protecting against the relitigation of common issues," as long as the state's application of its preclusion doctrines complies with due process. *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996). Due process under the United States Constitution precludes giving "a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein." *Id.* at 797 n. 4, 116 S.Ct. 1761 (internal marks omitted). "[A]lthough there are clearly constitutional limits on the 'privity' exception, the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Id.* at 798, 116 S.Ct. 1761. Finding a party to be a virtual representative for a nonparty to the suit is another way of saying that the nonparty was in privity with the party in the original suit. *See Pirrotta v. Indep. Sch. Dist. No. 347*, 396 N.W.2d 20, 22 n. 1 (Minn.1986) (noting that virtual representation appears to be no different from the traditional privity analysis).

"[V]irtual representation is best understood as an equitable theory rather than as a crisp rule with sharp corners and clear factual predicates, such that a party's status as a virtual representative of a nonparty must be determined on a case-by-case basis." *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir.1994) (internal citations omitted). As an equitable tool, courts weigh various factors in determining whether a party to a suit virtually represented a

nonparty. The weight and identity of the factors vary from case to case, but a few common threads appear throughout the cases, indicating a handful of critical factors. This court has previously concluded that "identity of interests between the two parties is necessary, though not alone sufficient." *Tyus v. Schoemehl,* 93 F.3d 449, 455 (8th Cir.1996), *cert. denied,* 520 U.S. 1166, 117 S.Ct. 1427, 137 L.Ed.2d 536 (1997). The Supreme Court has focused on notice (actual or constructive) and sufficient representation as minimum requirements before a nonparty can be bound by a prior judgment, particularly when a nonparty seeks to adjudicate private interests. *See Richards,* 517 U.S. at 805, 116 S.Ct. 1761; *see also Gonzalez,* 27 F.3d at 761 ("[N]otwithstanding identity of interests, virtual representation will not serve to bar a nonparty's claim unless the nonparty has had actual or constructive notice of the earlier litigation, and the balance of the relevant equities tips in favor of preclusion.") (internal footnotes omitted). Other factors that may support a finding of virtual representation include a close relationship, participation by the nonparty in the prior litigation, apparent acquiescence, tactical maneuvering by the nonparty to avoid the effects of the first action, and whether the issue involves public or private issues. *See Tyus,* 93 F.3d at 455-56; *Irwin v. Mascott,* 370 F.3d 924, 929-30 (9th Cir.2004) ("In short, a close relationship, substantial participation, and tactical maneuvering all support a finding of virtual representation; identity of interests and adequate representation are necessary to such a finding.").

The Supreme Court of Nebraska has not had a specific occasion to apply the doctrine of virtual representation, so we are tasked with determining how and whether that court would apply the doctrine in this case. Applying federal claim preclusion law, the Nebraska Supreme Court has held nonparties to be in privity with parties to a prior suit, noting that "privity requires, at a minimum, a substantial identity between the issues in controversy and showing the parties in the two actions are really and substantially in interest the same." *VanDeWalle v. Albion Nat'l Bank,* 243 Neb. 496, 500 N.W.2d 566, 573 (Neb.1993) (internal marks omitted) (holding that two brothers were collaterally estopped from litigating the ownership of a piece of property based on a prior suit brought by their parents). The Nebraska Supreme Court has quoted this language from *VanDeWalle* approvingly in subsequent cases applying Nebraska law. *See, e.g., R.W. v. Schrein,* 263 Neb. 708, 642 N.W.2d 505, 511 (Neb.2002) (holding that an insurer was not in privity with its insured where it had no duty to defend the insured on the claim that was the subject of the action); *Torrison v. Overman,* 250 Neb. 164, 549 N.W.2d 124, 132 (Neb.1996) (same). In addressing the privity prong of claim preclusion, the Supreme Court of Nebraska has stated that "due process requires that the rule . . . operate only against persons who have had their day in court either as a party to a prior suit or as a privy; *and, where not so, that at least the presently asserted interest was adequately represented in the prior trial.*" *Gottsch v. Bank of Stapleton,* 235 Neb. 816, 458

N.W.2d 443, 457 (Neb.1990) (emphasis added) (internal marks omitted). The Supreme Court of Nebraska has recognized, moreover, that the Nebraska class action statute, which allows a class representative to represent numerous parties with common interests, is analogous to the equitable doctrine of virtual representation. *See Blankenship v. Omaha Pub. Power Dist.,* 195 Neb. 170, 237 N.W.2d 86, 89-90 (Neb.1976) (recognizing that a class representative's interests must be compatible with the interests of all class members by drawing an analogy to the doctrine of virtual representation). Given the broad application of privity allowed by the Nebraska courts and the equitable nature of the doctrine, we agree with the district court that the Nebraska courts would consider the doctrine of virtual representation in determining whether a subsequent party was in privity with a party to an earlier suit. We proceed to weigh the relevant factors.

The interest asserted here is identical to the interests asserted in the *Pony Lake* litigation. The Plaintiffs here claim that the Committee's actions infringed upon their constitutional right to vote on the repeal of LB 126. The *Pony Lake* plaintiffs made the same constitutional claim, asserting "their right to vote on the forced consolidation of the Class I school districts." *Pony Lake,* 710 N.W.2d at 622-23. The Plaintiffs here assert their rights as voters and members of the Class I districts, the same interests held by the plaintiffs in the *Pony Lake* litigation. The

critical factor of similar interests required by *Tyus* is satisfied; indeed, the interests are identical.

Although the right to vote is an individual right, the claim here is not that the Plaintiffs were prevented from voting – they were not. Rather, the Plaintiffs claim that the Committee's actions of consolidating the school districts (as mandated by LB 126) prior to the election deprived them of an effective vote. We view this claim as public in nature. The Committee's actions complied with Nebraska law, and it was the Nebraska Constitution that required implementation of LB 126 prior to the referendum election that resulted in the repeal of LB 126. The Plaintiffs' voting rights claim in this lawsuit in effect challenges the constitutionality of Nebraska's state constitution based referendum scheme that provides for implementation of challenged legislation prior to the referendum vote unless ten percent of registered voters sign the referendum petition. This is analogous to the facts of *Niere,* where nonregistered voters brought Equal Protection and First Amendment challenges to the Missouri legislative scheme that allowed the disincorporation of their town based on a petition signed by a supermajority of registered voters. *See Niere v. St. Louis County, Mo.,* 305 F.3d 834, 838 (8th Cir.2002) (concluding that constitutional claims brought by nonregistered voters seeking to challenge the disincorporation of their town were public in nature); *see also Tyus,* 93 F.3d at 457 (characterizing First Amendment challenge as raising an issue of public law where "the plaintiffs [did] not

allege that they 'ha[d] a different private right not shared in common with the public'") (quoting *Stromberg v. Bd. of Educ. of Bratenahl,* 64 Ohio St.2d 98, 413 N.E.2d 1184, 1186 (Ohio 1980), which found a taxpayer's challenge to the dissolution of a school district to be public in nature and precluded by an earlier suit brought by the school board for the district).

The due process concerns that limit the application of the res judicata doctrine to nonparties are lessened when the rights asserted involve issues of public concern rather than private rights. *See Richards,* 517 U.S. at 803, 116 S.Ct. 1761 (distinguishing between public and private interests and noting that "States have wide latitude to establish procedures . . . to limit the number of judicial proceedings that may be entertained" in cases raising public issues); *Tyus,* 93 F.3d at 457 (noting that "the due process concerns attendant with a broad application of preclusion are lessened" in cases raising public issues). In *Tyus,* the court noted that the nonparties to the first suit would have benefitted if the named parties had won, but, absent preclusion, the nonparties were not harmed by the named party's loss. Thus, there was no incentive to intervene in the original action, and the lack of preclusion actually promoted fence sitting. *Tyus,* 93 F.3d at 457 ("[H]olding preclusion inapplicable assures that a party would not intervene, for it would allow various members of a coordinated group to bring separate lawsuits in the hope that one member of the group would eventually be successful, benefitting the

entire group."). The same is true here. When the *Pony* Lake plaintiffs were unsuccessful, a new group of voters and taxpayers brought this suit, raising the same claims. If preclusion is not proper here and the Plaintiffs in this case are not successful, nothing will prevent the next group of voters who voted to repeal LB 126 from filing another suit. "This entails a significant cost to the judicial system and discourages the principles and policies the doctrine of *res judicata* was designed to promote." *Id.*

Although none of the Plaintiffs in this case were named plaintiffs in the *Pony* Lake litigation, one of these Plaintiffs is the spouse of one of the litigants in *Pony* Lake, and the Plaintiffs here are represented by the same counsel as the *Pony Lake* plaintiffs. *See Tyus,* 93 F.3d at 457 (noting that the presence of the same counsel suggested that the parties were closely related); *VanDeWalle,* 500 N.W.2d at 573 (noting that the sons and parents had a close relationship with respect to the property at issue in holding that the judgment in the parents' prior suit barred the sons' later suit); *see also Trevino v. Gates,* 99 F.3d 911, 923-24 (9th Cir.1996) (applying virtual representation to a daughter's excessive force claim related to the death of her father where the decedent's mother (the plaintiff's grandmother) had already brought a wrongful death claim, based in part on the identical interests in seeing the officers punished and on the employment of the same attorney), *cert. denied,* 520 U.S. 1117, 117 S.Ct. 1249, 137 L.Ed.2d 330 (1997). While these factors are not dispositive nor sufficient alone

to establish privity, they do tend to tip the scale toward a finding of privity.

The Supreme Court has noted the importance of notice before a nonparty is precluded by a prior suit. *Richards,* 517 U.S. at 805, 116 S.Ct. 1761. The Plaintiffs do not assert that they were unaware of the *Pony Lake* litigation, and the inclusion of at least one of the Plaintiffs' spouses as well as employment of the same counsel in this suit, filed less than one month after the Supreme Court of the United States denied the *Pony Lake* plaintiffs' petition for a writ of certiorari, satisfy us that the Plaintiffs were on sufficient notice of the prior suit that their due process rights would not be unduly hindered by application of res judicata to this suit. Nor do the Plaintiffs assert that the *Pony Lake* plaintiffs failed to vigorously pursue the voting rights claim or that they otherwise ineffectively presented the claim. Cf. *Taylor v. Blakey,* 490 F.3d 965, 974-75 (D.C.Cir.2007) (considering the use of the same counsel as at least relevant to the issue of whether the nonparty was adequately represented in the prior suit as "strongly suggest[ing] satisfaction with the attorney's performance in the prior case"), *cert. granted,* ___ U.S. ___, 128 S.Ct. 977, 169 L.Ed.2d 800 (2008). The Plaintiffs argue only that they should have their own day in court. Based on the factors discussed above, we believe that the Nebraska courts would find these Plaintiffs to be in privity with the *Pony Lake* plaintiffs. The district court properly applied res judicata to preclude the Plaintiffs' right-to-vote claim.

III.

The appeal of the due process claims is dismissed for lack of standing. The district court's judgment on the right-to-vote claim is affirmed. The State Committee's Motion to Strike Portions of Appellants' Reply Brief and Argument in Support Thereof is denied.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-4093

TRUDY NOLLES; ANGIE PALMER;
DAVID M. JEFFREY

Plaintiffs-Appellants

v.

THE STATE COMMITTEE FOR THE
REORGANIZATION OF SCHOOL DISTRICTS;
KENDALL MOSELEY; GIL KETTELHUT;
TERESA HAWK; GERRY OSBORN;
TERRY LOSHEN

Defendants-Appellees

Appeal from District of Nebraska – Omaha
(8:06-cv-00422-LES)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the appeal of the due process claims is dismissed for lack of standing and the district court's

judgment on the right-to-vote claim is affirmed in accordance with the opinion of this Court.

April 28, 2008

Order Entered in
Accordance with Opinion:
Clerk, U.S. Court of Appeals,
Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

TRUDY NOLLES, ANGIE PALMER and DAVID M. JEFFREY, Plaintiffs, v. THE STATE COMMITTEE FOR THE REORGANIZATION OF SCHOOL DISTRICTS, KENDALL MOSELEY, GIL KETTELHUT, TERESA HAWK, GERRY OSBORN and TERRY LOSHEN, Defendants.	8:06CV422 MEMORANDUM OPINION (Filed Nov. 20, 2006)

This matter is before the Court following an evidentiary hearing held on October 16, 2006, during which the parties presented a stipulation of facts (Ex. 1), together with closing arguments. Both parties had previously submitted their respective briefs. At the conclusion of this hearing, the Court reserved ruling pending the results of the November 7, 2006, election at which the question of whether LB 126 should be retained or repealed was on the ballot, as plaintiffs' counsel represented that a vote to retain LB 126 would moot the issues in this case. As the voters voted to repeal LB 126, the Court now addresses the issues presented by the parties.

I. BACKGROUND

In 2005, over the Governor's veto, the Nebraska Legislature enacted LB 126 which, among other things, called for dissolving the state's Class I school districts, which serve only kindergarten through eighth grade students, and merging them into other larger school districts serving students through twelfth grade. LB 126 provided that by December 1, 2005, the State Committee was to issue orders directing how each Class I school district was to be merged with one or more Class II, III, IV or VI districts (Stipulation of Pacts, Ex. 1 ("SOF"), ¶¶ 4-5). These orders were not to take effect until June 15, 2006, after the end of the 2005-06 school year (SOF, ¶ 5). After that time the Class I school districts ceased to exist (SOP, ¶¶ 5, 10).

A referendum initiative effort was commenced pursuant to Neb. Const. art. III, §§ 1, 3 and 4, seeking a vote to repeal LB 126 in its entirety by a vote of the people at the next scheduled general election on November 7, 2006 (SOF, ¶ 6). The proponents of the referendum measure obtained sufficient signatures to place the measure on the ballot, but not enough, under Neb. Const. art. III, § 3, to suspend the operation of LB 126 pending the result of the election (SOF, ¶¶ 6-9).

As the State Committee's deadline to issue the orders dissolving and merging the Class I school districts (December 1, 2005) approached, three residents and taxpayers in Class I school districts and

some school districts themselves filed an action in the District Court of Lancaster County, Nebraska, seeking an injunction to prevent the State Committee from complying with LB 126 and issuing consolidation orders prior to the general election to be held in November, 2006 (SOF, ¶ 24; "Second Amended Complaint," Ex. 18), They sought this injunction even though the Nebraska Constitution specifies that a legislative enactment that is the subject of a referendum petition will not be suspended unless the petition supporters obtain valid signatures of at least ten percent of the registered voters (Neb. Const. art. III, § 3; SOF, ¶ 8). The state court plaintiffs claimed that LB 126's deadlines and the implementation of those deadlines violated the initiative and referendum rights of voters set forth in the Nebraska Constitution. In addition, the state court plaintiffs specifically asserted that LB 126, and the implementation of its deadlines for dissolving and merging the Class I school districts before the referendum vote will be held, violated their constitutional voting rights and right to freedom of speech under the United States Constitution ("Second Amended Complaint," Ex. 18, ¶¶ 22-36).

The district court found for and issued a permanent injunction enjoining the State Committee from issuing the orders dissolving and merging the Class I school districts (SOF, ¶¶ 25-26; "Orders," Exs. 20-21). The district court addressed the plaintiffs' federal constitutional voting rights claim, finding this "issue does not apply to the facts of this case." ("Order," Ex.

20 at 6). The state district court did not address the plaintiffs' free speech claim.

The State Committee took an immediate appeal from this decision of the district court (SOF, ¶ 27). By operation of Nebraska law, the State's appeal automatically acted as a stay of the district court's decision pending resolution of the appeal. Neb. Rev. Stat. § 25-21,213. Nonetheless, the plaintiffs in the state court action filed a motion with the Nebraska Supreme Court, asking that court to enjoin the State Committee from proceeding with the issuance of the dissolution and merger orders pending the appeal (SOF, ¶ 28). This motion was denied by the Nebraska Supreme Court on November 30, 2005 (SOF, ¶¶ 28 and 29; Exs. 22 and 23). Therefore, on December 1, 2005, there was no effective court order enjoining the State Committee from issuing the dissolution and merger orders; and under LB 126 the State Committee was required to do so. The State Committee issued the orders that day, although for most purposes such orders did not take effect until June 15, 2006 (SOF, ¶ 30).

The state court plaintiffs filed a cross-appeal in connection with the State's appeal of the district court's ruling (SOF, ¶ 31). In their cross-appeal, the state court plaintiffs raised a number of federal constitutional issues, including that the effective dates of LB 126 "result in the denial of the right to vote guaranteed by the First Amendment to the Constitution of the United States" and "denial of freedom of speech guaranteed by the First Amendment. . . ."

(Brief of Appellees and Brief on Cross-Appeal, Ex. 24, at 26).

Acting in an expedited manner, the Nebraska Supreme Court heard the appeal and cross-appeal in the state court action and, on March 3, 2006, issued its opinion reversing the decision of the district court (SOF, ¶ 32; *Pony Lake School District 30 v. State Committee for the Reorganization of School Districts*, 271 Neb. 173, 710 N.W.2d 609 (2006)). In its opinion, the Supreme Court found that the district court had improperly interpreted and applied Nebraska's constitutional provisions regarding initiative and referendum rights. Having reversed the district court on those grounds, the Supreme Court then addressed the issues raised in the plaintiffs' cross-appeal to determine whether any of them could serve as a basis for upholding the district court's injunction. The Supreme Court rejected the cross-appeal claims, including the claims that the effective dates of LB 126 violated voting and free speech rights under the federal constitution. *Id.*

On March 23, 2006, the state court plaintiffs filed a petition for a writ of certiorari in the United States Supreme Court (SOF, ¶ 33). The questions presented for review in the petition included the claims that dissolving and merging the Class I school districts before the referendum vote is held violated their voting and free speech rights ("Petition for Writ of Certiorari," Ex. 26, at I).

The state court plaintiffs subsequently submitted a motion to the Eighth Circuit Justice (Justice Alito), asking for an order staying the implementation of the merger orders until after the November 2006 general election (SOF, ¶ 34). This motion was filed on March 29, 2006, and was subsequently denied on April 11, 2006 (SOF, ¶¶ 34 & 35; "Application," Ex. 27; Letter from Supreme Court, Ex. 28). On May 15, 2006, the Supreme Court denied the petition for a writ of certiorari (SOF, ¶ 36; Letter from Supreme Court, Ex. 29).

The present plaintiffs filed the original complaint in this Court on June 8, 2006 (Filing No. 1) and an amended complaint on July 6, 2006 (Filing No. 13). Defendants filed their answer to the amended complaint on July 24, 2006 (Filing No. 15).

II. Claims of the Parties

Plaintiffs raise the following issues:

(1) That the action of the State Committee effectively denied the voters of the State of Nebraska the right to vote guaranteed by the United States Constitution;

(2) That the actions of the State Committee has infringed on the First Amendment freedom of speech rights of the advocates for repeal of LB 126;

(3) That the State Committee's actions in dissolving the Class I school districts violates the due process clause of the Fourteenth

> Amendment because it has interfered with the voters right to decide the question of the repeal of LB 126; and
>
> (4) That the State Committee procedurally violated the due process clause of the Fourteenth Amendment because no proper due process hearing was held for the Class I school districts to be dissolved and LB 1226 did not provide for any appeal to state court despite the fact that the State Committee's action was a quasi-judicial process.

(First Amended Complaint, ¶¶ 17-31).

Defendants assert that plaintiffs' claims are barred by the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) because all of the claims either were, or could have been, fully litigated in the *Pony Lake* litigation decided by the Nebraska Supreme Court (Answer, ¶¶ 32-33).

II. DISCUSSION

While the Court concludes that the doctrine of res judicata is dispositive of this case, it will first address plaintiffs' claims.

A. Free Speech and Voting Rights Claims

On November 7, 2006, the voters of Nebraska voted to repeal LB 126. The Court notes that where the voters did in fact vote on this issue, and did vote

to repeal LB 126, the claims that the State Committee's action violated the constitutional rights to vote and of freedom of speech are moot and need not be considered.

B. Due Process Claims

Plaintiffs maintain that claim preclusion cannot be applied to their due process claims because those claims could not have been raised by the *Pony Lake* plaintiffs. As to the substantive due process claim, plaintiffs characterize this as a claim of "fundamental unfairness of the referendum election caused by the Defendants' actions." However, it was not the actions of defendants (the State Committee and its members) that resulted in what plaintiffs allege would be a flawed or unfair election. Rather, is the time line requirements of LB 126, when combined with the Nebraska Constitution's requirement that it takes signatures of ten percent of the registered voters to suspend operation of a statute and the failure to obtain that number of signatures, that have caused the present situation. Defendants merely followed the specific dictates of LB 126 in issuing the dissolution orders on December 1, 2005, and in making those orders effective on June 15, 2006.

The claim that the LB 126 time lines would render the November, 2006, referendum election "fundamentally unfair" because the Class I school districts would have been dissolved before that election could be held, was fully developed and ripe as

soon as it was known that insufficient signatures had been gathered on the referendum petition to suspend operation of LB 126 until after the election was held. The Secretary of State announced the signature shortfall on October 24, 2005. The *Pony Lake* lawsuit was filed in state court the next day and the Second Amended Complaint in *Pony Lake* was filed on November 17, 2005. Thus, while *Pony Lake* was still in the pleading stage, it was clear that LB 126's time lines, and the failure to obtain signatures of ten percent of registered voters, could result in a referendum election that plaintiffs claim is "fundamentally unfair" because the dissolution of the Class I school districts would be completed before the election is held.

This claim could have been raised in the *Pony Lake* litigation. The *Pony Lake* plaintiffs were well aware that, unless the LB 126 time lines for dissolution of the Class I school districts were superseded by court order, such districts "will have ceased to exist" prior to the referendum election (Second Amended Complaint, Ex. 18, ¶ 39). The *Pony Lake* plaintiffs advanced a claim that the referendum election would be an unauthorized "advisory vote" unless the State Committee was enjoined from proceeding to issue dissolution orders according to the time line set out in LB 126. *Id.* There is no reason why this "advisory vote" claim in *Pony Lake* could not have been expanded to include a claim that the election would also be "fundamentally unfair" and, allegedly, violative of substantive due process standards because it was a

"question relevant to and falling within the purview of the original action [*Pony Lake*] . . . which could have been presented [in that case] by the exercise of diligence." *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 106, 181 N.W.2d 119, 123 (1970).

In their procedural due process claim, plaintiffs assert that they are property taxpayers who were denied a full evidentiary hearing by the State Committee before that body issued its orders dissolving the Class I school districts. Plaintiffs claim that their property taxes were affected by the State Committee's action and that, therefore, they were entitled to a full evidentiary hearing before the dissolution of the Class I school districts occurred. Plaintiffs assert that this procedural due process claim could not have been advanced in *Pony Lake* because the State Committee had not yet met to consider the dissolution of the Class I school districts when *Pony Lake* was completed in the state district court.

Section 2(3) of LB 126 (Ex. 2) states that "[t]he State Committee for the Reorganization of School Districts is not required to conduct public hearings prior to issuing orders pursuant to this section." This language, while not specifically prohibiting the holding of hearings by the State Committee, clearly evinces a legislative intent that such hearings not be held. Moreover, nothing in LB 126 authorizes the State Committee to conduct public hearings before carrying out the instructions of the statute and dissolving the Class I school districts. The Legislature made clear that the State Committee was not

required to hold hearings and provided no authority to the State Committee to do so.

Under Nebraska law "[a]n administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act." *Brunk v. Nebraska State Racing Commission*, 270 Neb. 186, 193, 700 N.W.2d 594, 601 (2005). Thus, once LB 126 was enacted on June 3, 2005, there was absolutely no reason to believe that the State Committee could or would conduct full evidentiary hearings in connection with the dissolution of the Class I school districts. Indeed, even if the State Committee had held hearings, the State Committee still would have been limited to determining which adjoining district each Class I district would be merged with because the State Committee was not empowered to address whether or not to dissolve any or all Class I districts. Thus, the procedural due process claim could have been made in *Pony Lake*. LB 126 could have been attacked directly for allegedly not providing the requisite procedural due process prior to dissolution of the Class I school districts. The *Pony Lake* plaintiffs could have posited this alleged denial of due process as another alternative basis for enjoining the State Committee from meeting and issuing the dissolution orders. *See, e.g.*, Nebraska Rules of Pleading in Civil Actions, Rule 8 ("Relief in the alternative or of several different types may be demanded."). Like their substantive due process claim, plaintiffs' procedural due process claim was "relevant to and falling

within the purview of the original action [*Pony Lake*] . . . [and] could have been presented [in that case] by the exercise of diligence." *Norlanco*, 186 Neb. at 106, 181 N.W.2d at 123. Thus, this claim is also precluded.

C. Res Judicata

The dispositive issue before the Court is whether or not the actions of the Nebraska Supreme Court in *Pony Lake*, serves to preclude this Court from acting on the grounds of res judicata. The Court looks to Nebraska law to determine the preclusive effect of the *Pony Lake* litigation and decision in the present action.

The Nebraska Supreme Court, has stated that "under the traditional rule of res judicata, any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated by the parties and privies." *McCarson v. McCarson*, 263 Neb. 534, 539, 641 N.W.2d 62, 68 (2002) (*citing Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001)). The doctrine of res judicata, precluding subsequent litigation of the same cause of action, in application is broader than a determination of the questions involved in the prior action. "[T]he conclusiveness of the judgment in such case extends not only to matters actually determined, but also to

other matters which could properly have been raised and determined therein. The rule applies to every question relevant to and falling within the purview of the original action, in respect to matters of both claim or grounds of recovery, and defense, which could have been presented by the exercise of diligence." *State v. Keen*, 272 Neb. 123, 129-30, 718 N.W.2d 494, 500 (2006) (*quoting Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 106, 181 N.W.2d 119, 123 (1970)).

Here, the primary question is whether or not the present plaintiffs are in privity with the plaintiffs in the *Pony Lake* state court litigation. If so, then both claim and issue preclusion will apply to bar their claims in the present action.

Privity under the Doctrine of Virtual Representation.

At issue is whether Nebraska courts would conclude that plaintiffs are in privity with the *Pony Lake* plaintiffs under the virtual representation doctrine. Nebraska case law has not directly answered this question in the context of public law litigation involving the constitutionality of a state statute.

The *Pony Lake* plaintiffs initially sought to represent a "class" that was to include all registered voters in the State of Nebraska (*Pony Lake* Second Amended Complaint, Ex. 18, ¶¶ 4, 6, 16 and 18). The state district court concluded that such a class was too broad and would necessarily include persons with differing interests because, unlike the *Pony Lake*

plaintiffs and plaintiffs in the present action, some registered voters undoubtedly support the dissolution and consolidation of the Class I school districts on the time line set out in LB 126 and do not support the referendum effort (*Pony Lake* Order, Ex. 21 at 7-8). The state district court did not find a "conflict of interest" between the *Pony Lake* plaintiffs and every other registered voter in the state and certainly did not find a conflict of interest with those registered voters who, like plaintiffs herein, favor the referendum on LB 126 and oppose the dissolution of the Class I school districts. Indeed, plaintiffs do not point to any interests they have that are different than or in conflict with those of the named individual *Pony Lake* plaintiffs. The state district court's ruling on the class action request in *Pony Lake* did not prevent the present plaintiffs from joining the plaintiffs in that earlier litigation.

In Blankenship v. Omaha Public Power Dist., 195 Neb. 170, 175, 237 N.W.2d 86, 89 (1976), the Nebraska Supreme Court recognized the "equitable doctrine of virtual representation" but did not limit the application of that doctrine to class actions. Rather, the Nebraska Supreme Court simply stated that the class action statute "represents an application of the equitable doctrine of virtual representation. . . ." *Blankenship*, 195 Neb. at 175, 237 N.W.2d at 89. The *Blankenship* court only addressed the application of the virtual representation doctrine to class actions. The court did not address, positively or

negatively, the virtual representation doctrine in a non-class action scenario.

The Nebraska Supreme Court recognizes that issue preclusion may operate against a party who was not a party or in privity with a party to the prior action so long as "the presently asserted interest was adequately represented in the prior trial." *Gottsch v. Bank of Stapleton,* 235 Neb. 816, 837, 458 N.W.2d 443, 457 (1990) (*quoting Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 29, 230 N.W.2d 99, 106 (1975)). This is the essence of the virtual representation doctrine. Thus, the Court finds that the Nebraska Supreme Court would recognize that the doctrine of virtual representation exists and may be applied in appropriate circumstances to bar claims or issues, even where the parties to the subsequent lawsuit were not parties to the prior lawsuit or in privity with the parties to the prior lawsuit.

The Court finds that, if presented with this issue, the Nebraska Supreme Court would adopt the Eighth Circuit Court of Appeal's view of virtual representation enunciated in *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996), *cert. denied,* 520 U.S. 1166 (1997), because the present lawsuit challenges the constitutionality of a statute having statewide impact on the structure of Nebraska's school system on the same grounds as the *Pony Lake* lawsuit. *Tyus* involved the second of two lawsuits challenging the drawing of ward boundaries in St. Louis, Missouri, on the grounds that the new boundaries unconstitutionally diluted the voting power of African-Americans. *Tyus,*

93 F.3d at 451. At issue in *Tyus* was whether issue preclusion barred the Court from considering the present case on its merits because the issues were the same as those raised in the earlier action. *Id.* at 453. The Eighth Circuit held that issue preclusion applied in the second action because the issues raised were the same as those raised and decided in the earlier action and, therefore, the plaintiffs in the second action were in privity with the plaintiffs in the first action because they were adequately represented in the earlier action under the doctrine of virtual representation. *Id.* at 453, 458.

The *Tyus* Court looked to several factors to determine that the plaintiff's interests had been adequately represented in the earlier action, including whether the claims raised in the two suits were identical, whether the same counsel argued both cases and whether the incentive to litigate was similar. *Id.* at 456-57. The Court specifically noted that, "[a]dequate representation is best viewed in terms of incentive to litigate." *Id.* at 458.

The *Tyus* Court found that "the second lawsuit directly contravenes the policies supporting the preclusion doctrines" because a victory by the plaintiffs in the first suit would have directly benefitted the plaintiffs in the second suit, but,

> without virtual representation, a loss by the [first] plaintiffs would cause no harm to the [second] plaintiffs. In such a situation, there is no incentive to intervene. Quite the contrary: holding preclusion inapplicable assures

> that a party would not intervene, for it would allow various members of a coordinated group to bring separate lawsuits in the hope that one member of the group would eventually be successful, benefitting the entire group. This entails a significant cost to the judicial system and "discourages the principles and polices the doctrine of res judicata was designed to promote."

Id. at 457 (*quoting Petit v. City of Chicago,* 766 F. Supp. 607, 613 (N.D. Ill. 1991). The *Tyus* Court also noted that the fact that a case raises an issue of public law is another factor in favor of preclusion. *Id.*

> Although virtual representation may be used in the private law context, its use is particularly appropriate for public law issues. As the Supreme Court recently noted, when a case challenges a "public action that has only an indirect impact on [a party's] interests," due process concerns are lessened. In this situation, courts have "wide latitude to establish procedures . . . to limit the number of judicial proceedings. . . ."

Id. at 456 (*quoting Richards v. Jefferson County, Alabama,* 517 U.S. 793, 803 (1996).

As in *Tyus,* the present plaintiffs are raising the same claims as the *Pony Lake* plaintiffs, they have the same counsel and the same incentive to litigate. Further, a public law is at issue which lessens the due process concerns raised by the doctrine of virtual representation. The Court finds that the doctrine of

virtual representation, as enunciated in *Tyus,* should be applied to the present case.

Plaintiffs assert that "control" of the previous lawsuit is the touchstone of virtual representation. Plaintiffs contend that virtual representation cannot apply without proof that they controlled the *Pony Lake* litigation. While participation in and control of the prior litigation are factors to be considered in determining whether or not to apply the virtual representation doctrine, they are not the most significant factors. Indeed, under both Nebraska and federal case law, a much more important consideration is whether the interests of the party sought to be precluded were "adequately represented" in the earlier litigation.

In *Gottsch,* the Nebraska Supreme Court indicated that rules of preclusion may be applied even where traditional concepts of "privity" are not met, so long as the "presently asserted interest was adequately represented in the prior trial." *Gottsch,* 235 Neb. at 837, 458 N.W.2d at 457. Similarly, the Supreme Court and the Eighth Circuit have both stressed that a central consideration is whether or not there was "adequate representation" of the party's interests in the prior litigation. *Richards v. Jefferson County, Alabama,* 517 U.S. 793, 798 (1996); *NAACP v. Metropolitan Council,* 125 F.3d 1171, 1175 (8th Cir. 1997).

Plaintiffs have offered no evidence to support an assertion that their interests were not adequately

represented by the *Pony Lake* plaintiffs. In fact, plaintiffs' interests as voters seeking to vindicate their constitutional "voting rights" and as citizens seeking to exercise their First Amendment free speech rights were vigorously advanced in *Pony Lake. Pony Lake,* 271 Neb. at 188-92, 710 N.W.2d at 622-25. Likewise, plaintiffs' due process interest in having the referendum vote have actual meaning was also advanced in *Pony Lake. Id.* at 192, 710 N.W.2d at 625. In short, plaintiffs' interests in vindicating their rights under the state and federal constitutions were fully and adequately represented in *Pony Lake.* Plaintiffs' interests are the same as the interests of the *Pony Lake* plaintiffs, and those interests were more than adequately represented in the *Pony Lake* litigation.

Plaintiffs cite three Nebraska cases asserting that these cases suggest that the Nebraska Supreme Court would not find the doctrine of virtual representation applicable. The Court disagrees. First, the Court finds that two of the cases cited by plaintiffs – *Gottsch* and *Thomas Lake Owners Assn. v. Riley,* 9 Neb. App. 359, 612 N.W.2d 529 (2000) – did not involve a public law issue or a constitutional challenge to the validity of a statute or a public body's implementation of a statute, and they are inapposite. Next, the Court finds that the third case cited by plaintiffs, *Blankenship,* a challenge to certain late payment fees charged by the Omaha Public Power District, never went further than a determination that the plaintiff therein could not represent the class

he purported to represent because of differing interests within the class. No preclusion issues were presented in *Blankenship*. Thus, *Blankenship* does not contradict the Eighth Circuit's decision in *Tyus*.

Plaintiffs next assert that application of the doctrine of virtual representation would result in a denial of due process. Plaintiffs rely primarily on language found in *Richards*. This reliance is misplaced. In *Richards,* the Supreme Court made clear that "extreme applications" of preclusion doctrines "may be inconsistent with a federal right that is 'fundamental in character.'" *Richards,* 517 U.S. at 797. Nonetheless, the *Richards* court noted that, "although there are clearly constitutional limits on the 'privity' exception, the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Id.* at 798. Further, the *Richards* Court stated: "'We have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party.'" *Id.* at 798 (*quoting Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989)). The *Richards* court recognized that where a taxpayer or other individual is using his or her status to complain about "public action that has only an indirect impact on his [or her] interests," due process concerns of applying preclusion doctrines are reduced and states have great latitude to establish procedures limiting

the "number of judicial proceedings that may be entertained." *Id.* at 803.

Significantly, the Eighth Circuit's *Tyus* decision was issued some two months after *Richards*. The Eighth Circuit panel reviewed the *Richards* decision and found that while the Supreme Court provided some examples of what could constitute privity, the Court did not offer a general definition of that term. *Tyus*, 93 F.3d at 455. Rather, the Eighth Circuit found the Supreme Court acknowledged that "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Id.* (*quoting Richards*, 517 U.S. at 798).

Some thirteen months after *Tyus* was decided, in *NAACP,* another Eighth Circuit panel reaffirmed that the doctrine of virtual representation was appropriate in certain circumstances.

> In this circuit, "'a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with [the person's] interests as to be [that person's] virtual presentative.'" *Tyus*, 93 F.3d at 454 (*quoting Aerojet-General Corp. v. Askew,* 511 F.2d 710, 719 (5th Cir. 1975)). Nonparty preclusion based on virtual representation involves an equitable, case-by-case inquiry, and there is no clear test for courts to apply. . . .
>
> Nevertheless, analyzing a particular case in light of the factors the court identified in

> *Tyus* enables us to "ensure that the relationship between the party to the original suit and the party sought to be precluded in the later suit is sufficiently close to justify preclusion." *Id.*

NAACP, 125 F.3d at 1175. Under *NAACP,* the key question is whether the interests of the parties (to be precluded) in the subsequent litigation were adequately represented in the earlier litigation. *Id.* Thus, courts have found it proper, even after *Richards,* to apply the virtual representation doctrine to bar successive lawsuits in appropriate circumstances, even where plaintiffs assert due process concerns.

The Court finds that the Nebraska Supreme Court has recognized the existence and applicability of the virtual representation doctrine in certain circumstances. While the Nebraska Supreme Court has not spoken to the applicability of the virtual representation doctrine when both the previous and present lawsuit involve the same issue of public law, the Court believes that the Nebraska Supreme Court would follow the Eighth Circuit's reasoning in *Tyus* to find the present plaintiffs in privity with the *Pony Lake* plaintiffs and in not permitting the opponents of the dissolution of the Class 1 school districts to simply "reload" with new plaintiffs in order to again attack a statute with which they disagree.

IV. CONCLUSION

Having found that the Nebraska Supreme Court's decision in *Pony Lake* is res judicata on all issues raised in this action; that plaintiffs' claims that their right to vote and their right of freedom of speech are moot as a successful vote has occurred; and that the procedural and substantive due process claims are without merit, the Court will dismiss this action. A separate order will be entered in accordance with this memorandum opinion.

DATED this 20th day of November, 2006.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

TRUDY NOLLES, ANGIE PALMER and DAVID M. JEFFREY, Plaintiffs, v. THE STATE COMMITTEE FOR THE REORGANIZATION OF SCHOOL DISTRICTS, KENDALL MOSELEY, GIL KETTELHUT, TERESA HAWK, GERRY OSBORN and TERRY LOSHEN, Defendants.	8:06CV422 ORDER AND JUDGMENT (Filed Nov. 20, 2006)

Pursuant to the memorandum opinion entered herein this date,

IT IS ORDERED that plaintiffs' first amended complaint is dismissed.

DATED this 20th day of November, 2006.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Senior Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-4093

Trudy Nolles, et al.,

Appellants

v.

The State Committee for the
Reorganization of School Districts, et al.,

Appellees

Appeal from District of Nebraska – Omaha
(8:06-cv-00422-LES)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 11, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans